IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.GIRI

THURSDAY, THE 9TH AUGUST 2007 / 18TH SRAVANA 1929

OP.No. 31559 of 2000(F)

PETITIONER:

DR.I.T.KUNJAPPAN, P.I.BUNGLOW,
KOTTARAKKARA.

BY ADVS. SRI.N.SUKUMARAN
SRI.S.SHYAM
& SRI.LATHEESH SEBASTIAN

RESPONDENTS:

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1. DISTRICT MEDICAL OFFICER, IDUKKI.

2. DIRECTOR OF HEALTH SERVICES, TRIVANDRUM.

3. STATE OF KERALA, REPRESENTED BY THE CHIEF SECRETARY TO GOVERNMENT, TRIVANDRUM.

BY GOVERNMENT PLEADER SMT.N.SUDHADEVI

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 09/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONERS' EXHIBITS:

EXT.P1: TRUE COPY OF THE ORDER OF THE 2ND RESPONDENT DATED 28.3.1987 BEARING NO.K.DIS.EAT-32870/82/DHS.

EXT.P2: TRUE COPY OF THE COMMUNICATION ISSUED BY THE 2ND RESPONDENT TO THE PETITIONER BEARING NO.EA-1-32870/82/DHS DT. 6.11.86.

EXT.P3: TRUE COPY OF THE LEAVE APPLICATION SUBMITTED BY THE PETITIONER BEFORE THE 1ST RESPONDENT DATED 5.5.82.

EXT.P4: TRUE COPY OF THE CERTIFICATE FOR ISSUING Ext.P3 TO THE 1ST RESPONDENT DT. 5.5.82.

EXT.P5: TRUE COPY OF THE EXTRACT OF THE PROCEEDINGS OF THE 2ND RESPONDENT DATED 2.9.1987, NO.50468/87/DHS.

EXT.P6: TRUE COPY OF THE NOTICE ISSUED BY THE 3RD RESPONDENT TO THE PETITIONER BEARING NO.48176/172/86/H &FWD DATED 18.9.86.

EXT.P7: TRUE COPY OF THE EXPLANATION SUBMITTED BY THE PETITIONER TO Ext.P6, DATED 22.11.1986.

EXT.P8: TRUE COPY OF THE ORDER OF THE 3RD RESPONDENT BEARING G.O.MS.NO.72/88/H&FWD DT. 25.4.1988.

EXT.P9: TRUE COPY OF THE REVIEW PETITION SUBMITTED BY THE PETITIONER BEFORE THE 3RD RESPONDENT DT. 8.6.88.

EXT.P10: TRUE COPY OF THE ORDER BEARING NO.ECI/103404/84/DHS DT. 8.8.1988.

EXT.P11: TRUE COPY OF THE REPLY SUBMITTED BY THE PETITIONER TO Ext.P10 DATED 5.1.1988.

EXT.P12: TRUE COPY OF THE REPRESENTATION FORWARDED ALONG WITH Ext.P11 BY THE PETITIONER TOT THE 3RD RESPONDENT DATED 5.11.1988.

EXT.P13: TRUE COPY OF THE JUDGMENT IN O.P.NO.7931/1989 ON THE FILES OF THE HON'BLE HIGH COURT OF KERALA DT. 13.10.1992.

EXT.P14: TRUE COPY OF THE ORDER OF THE 3RD RESPONDENT BEARING NO.G.O.MS.NO.39/93/H&FWD, TVM DT. 22.3.1993.

EXT.P15: TRUE COPY OF THE JUDGMENT IN O.P.NO.4765/93 DT.5.1.99 OF THE HON'BLE HIGH COURT OF KERALA .

EXT.P16: TRUE COPY OF THE NOTICE ISSUED BY THE 2ND RESPONDENT TO THE PETITIONER DATED 23.3.99, NO.EC2/23078/99/DHS.

EXT.P17: TRUE COPY OF THE SHOW CAUSE NOTICE ISSUED BY THE 3RD RESPONDENT TO THE PETITIONER BEARING NO.4260/172/99/H & FWD TVM DT. 15.12.99.

EXT.P18: TRUE COPY OF THE REPORT OF THE ENQUIRY OFFICER DT. NIL.

EXT.P18(A):TRUE COPY OF THE COVERING LETTER ISSUED ALONG WITH Ext.P18 TO THE PETITIONER BY THE 3RD RESPONDENT BEARING NO.4260/172/99/H& FWD DT. 13.1.200.

EXT.P19: TRUE COPY OF THE EXPLANATION SUBMITTED BY THE PETITIONER TO Ext.P17 DATED 24.1.2000.

EXT.P20: TRUE COPY OF THE FINAL ORDERS IN THE PROCEEDINGS AGAINST THE PETITIONER PASSED BY THE 3RD RESPONDENT BEARING NO.GO.(MS) NO.269/2000/H & FWD, TVM DT. 19.10.2000.

RESPONDENTS' EXHIBITS: NIL

//true copy//

P.S. To Judge

SK/-

V.GIRI, J.

O.P.No.31559 of 2000 F

Dated this the 9th day of August, 2007.

JUDGMENT

The petitioner, who was working as an Assistant Surgeon in the Health Services Department, challenges the order passed by the Government on 19.10.2000, Ext.P20, removing him from service with effect from 23.4.1982, stated to be the date from which he was unauthorisedly absent. He also challenges Ext.P17 notice of show cause issued by the Government requiring the petitioner to show cause against a proposal for removing him from service with effect from 23.4.1982 and Ext.P18, the report of enquiry conducted by Dr.D.P.Subash Chandra Bose into the allegations levelled against the petitioner for unauthorised absence with effect from 23.4.1982. The reply given by the petitioner, Ext.P19, was found to be unsatisfactory and therefore, the provisional decision communicated in Ext.P17 was confirmed and the order passed is Ext.P20. As stated above, the petitioner challenges Exts.P17, P18 and P20 final order passed by the Government.

2. The petitioner, who joined the Health Services Department on 7.7.1967 as an Assistant Surgeon, was sent on deputation to the Medical Trust Hospital, Kottarakkara, with effect

from 1.4.1976, which was extended from time to time upto 31.3.1981. He was issued orders posting him as Assistant Surgeon in the T.B.Clinic, Kottarakkara with effect from 15.4.1981. He joined the same day, but entered on leave with effect from 16.4.1981 and he continued on leave till 21.4.1982. On the expiry of the said leave, the petitioner was reposted as an Assistant Surgeon at the Primary Health Centre, Chithirapuram on 22.4.1982, but he promptly entered on casual leave for 14 days from 23.4.1982 to 6.5.1982.

3. It is the case of the petitioner that he applied for 5 years' leave on loss pay from 7.5.1982 to 6.5.1987. Ext.P3 is the application submitted in that behalf. Receipt of Ext.P3 by the competent authority is a matter in dispute. Ext.P6 notice was issued by the 3rd respondent-State requiring the petitioner to show cause why he should not be removed from service for absence without leave from 23.4.1982. According to the petitioner, he submitted his explanation vide Ext.P7. It is his further case that Ext.P8 order was passed by the 3rd respondent removing him from service; that the order was not preceded by an enquiry; that there was no notice issued to the petitioner regarding any disciplinary

proceedings; that an application for review filed by him before the Government was also dismissed and that he challenged the order removing him from service in O.P.No.4765/93.

4. The Government tried to defend the order of termination, inter alia, on the ground that the petitioner's address could not be ascertained; that a notice proposing an enquiry could not be served on him; that the Government had, in the circumstances, dispensed with the procedure as contemplated by the Kerala Civil Services (Classification, Control and Appeals) Rules, 1960 {for short '**the Rules'**} by invoking the power under Rule 18(2) of the said Rules. This court, in Ext.P15 judgment, proceeded to find that even in the absence of a delinquent Government Servant, in terms of Sub-rule (7) of Rule 15, it was incumbent on the inquiring authority to consider the available evidence on record and to arrive at a finding with regard to the charges. This court proceeded to find as follows:

> **"So, in this case, dispensation of the enquiry was improper and the procedure has thus been vitiated, Exhibit P6 show cause notice issued before the conduct of enquiry, Ext.P8 imposition of penalty and Ext.P14 order confirming such penalty are unsustainable and accordingly quashed. Government is free to conduct the**

> **enquiry by issuing notice to the petitioner in the address given in this Original Petition or in the address, if any furnished, by the petitioner within two weeks from today by registered post addressed to the Government."**

5. The net result was that the show cause notice which was issued prior to the proposal for the conduct of enquiry was itself interfered with by this court. The earlier order imposing major penalty was also set aside. The Government was given an opportunity to conduct a fresh enquiry by issuing an appropriate notice to the petitioner.

6. Ext.P16 notice was thereafter issued by the Director of Health Services stating that the Additional Director of Health Services (Vigilance) will conduct an enquiry in his chambers. The petitioner was required to attend the enquiry and it is common case that Ext.P18 report is the result of the enquiry stated to have been conducted on 7.4.1999. There is a dispute as to the nature of the enquiry. The petitioner maintains that it was not a proper enquiry that was conducted. In was only in the nature of a discussion and there was infraction of Rules in the conduct of enquiry. Be that as it may, Ext.P18 notice of show cause requiring the petitioner to submit his objections, if any, to the provisional decision for

removing him from service was served on the petitioner. The explanation offered by him in Ext.P19 was not found to be satisfactory and the Government again passed an order, Ext.P20 removing the petitioner from service. It is Ext.P20 which is the subject matter of challenge in this original petition.

7. A counter affidavit has been filed on behalf of the 3rd respondent supporting the orders under challenge. According to the 3rd respondent, the procedure as contemplated under Rule 15 of the Rules was followed in the present case and the order removing him from service is sustainable in law.

8. Learned counsel for the petitioner Mr.N.Sukumaran contended that the dispensation of an enquiry in terms of Rule 15 of the Rules was found to be illegal by this court in Ext.P15 judgment. Ext.P6 show cause notice itself was interfered with. This court directed that an enquiry in terms of Rule 15 was mandatory. Such an enquiry will necessarily have to be conducted in terms of Rule 15 of the Rules. According to the petitioner, this postulated the issuance of a notice framing charges followed by an opportunity to the delinquent officer to submit his written statement of defence, and a formal enquiry in terms of Rule 15 of the Rules.

He contended that the procedure as contemplated by Rule 15 of the Rules was not followed in the present case and the Government simply issued Ext.P18 without the same being preceded by an enquiry which mandatorily has to be held in all cases where imposition of a major penalty is contemplated.

9. On the contrary, learned Government Pleader contended that it is not a matter in dispute that no order was passed by any competent authority sanctioning the application for leave made by the petitioner as Ext.P3. No Government Servant is entitled to remain absent merely by submission of an application for leave. The responsibility to obtain orders from the competent authority is more pronounced where the period of leave applied for is 5 years. The petitioner obviously did not pursue his application for leave which is alleged to have been submitted in the year 1982. A step on the part of the petitioner was taken only after Ext.P6 show cause notice was issued to him. Learned Government Pleader contended that, in the circumstances, the order removing the petitioner from service is eminently sustainable.

10. After having heard both sides, I am of the view that the order of the Government requires to be interfered with on a

short ground. Ext.P15 judgment interfered with Ext.P6 show cause notice as also the order imposing the penalty and the order issued dismissing the application for review submitted by the petitioner. In Ext.P15 judgment, this court affirmed the necessity of holding an enquiry in terms of Rule 15 of the Rules in the circumstances where major penalty is proposed to be imposed. Once the original show cause notice itself is set at naught by this court, it was obviously necessary for the Government to start from the stage contemplated by Rule 15(2) of the Rules. This required the Government to frame definite charge/charges which is to be communicated to the Government Servant together with the statement of allegations on which each charge is based. The accused/Government Servant will get an opportunity to submit his written statement of defence in which he may also state whether he desires to be heard in person. The enquiry is to be held in terms of Rule 15(2)(b) and it is obviously open for the Government to amend, alter or modify the charges in terms of Rule 15(3). No doubt, there is a dispute as to whether the Additional Director of Health Services held a formal enquiry in terms of the Rules, subsequent to Ext.P15 judgment. Assuming that the version given

by the Government in the counter affidavit is to be accepted in this behalf, it still does not save the situation insofar as Ext.P20 order is concerned. It is not the case of the Government that subsequent to Ext.P15 judgment charges were framed de novo by the Government and that the same was communicated with the written statement of allegations in terms of Rule 15(2) of the Rules. That has not been done. The charges should show that the petitioner had absented himself from duty without an order sanctioning leave by a competent authority. In fact, I observe that it is not the petitioner's case that he had obtained any such orders from the competent authority. A responsible Government Servant cannot remain away from duty and that too, for a period of 5 years on the mere premise that he had submitted an application for leave. It was, therefore, obviously open to the Government to frame a charge regarding the unauthorised absence from duty, in circumstances where, the Government servant was not armed with an order of sanction of leave from the competent authority. Such specific charges have not been framed in this behalf by the Government. Assuming that Ext.P6 contains the charge, the same has been interfered with by this court in Ext.P15 judgment and

therefore, it was mandatory for the Government to proceed from the stage of Rule 15(2) of the Rules before imposing any order of major punishment on the petitioner. The Government obviously had the liberty to do so in view of Ext.P15 judgment.

11. Once it is found that the Government was bound to frame charges and issue the same to the petitioner, the rest of the procedure prescribed in Rule 15 of the Rules will also have to be followed as a consequence. The net result is that Ext.P17 notice of show cause and Ext.P18 report of the Inquiry Officer cannot form the basis of an order removing the petitioner from service.

12. In the result, I allow the original petition in part. Exts.P17, P18 and P20 are quashed. I direct the Government to issue a memo of charges in terms of Rule 15(2) of the Rules as permitted in Ext.P15 judgment. The disciplinary action was commenced in the year 1986 and it has still not become final in the year 2007. In the circumstances, a memo of charges will be issued within two months from the date of receipt of a copy of this judgment. The petitioner will be permitted to submit his written statement of defence and an enquiry will be held as contemplated by Rule 15 of the Rules. It is open to the Government, on

conclusion of Inquiry, to propose the imposition of a penalty which is deemed necessary, fit and proper, depending upon the result of the enquiry. Final orders in terms of the Rules will be passed within a period of six months from the date of receipt of a copy of this judgment.

The original petition is disposed of as above. In the facts and circumstances, there will be no order as to costs.

Sd/-
(V.GIRI)
JUDGE

sk/

//true copy//

V.GIRI, J.

O.P.No.31559 of 2000

JUDGMENT

9th August, 2007.